Filed 5/26/11 In re Shellock CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re GENESIS CHRISTIAN SHELLOCK, on Habeas Corpus.	H034283 (Santa Clara County Super. Ct. No. CC589123)

Petitioner Genesis Christian Shellock requests issuance of a writ of habeas corpus on the ground that his trial attorney rendered ineffective assistance of counsel. This is a successor petition, filed in this court after we issued an order to show cause returnable in the superior court and that court held an evidentiary hearing. The superior court concluded that the evidence presented did not demonstrate ineffective assistance of counsel. We again issued an order to show cause returnable in this court. We will deny the petition for writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKBROUND

The historical and procedural facts underlying petitioner Shellock's convictions are set forth in the unpublished opinion in his direct appeal, *People v. Shellock*, (Jun. 29, 2007, H029675) [nonpub. opn.] (*Shellock I*). We take judicial notice of our opinion, and quote from its statements of the case and facts, as supplemented with some additional facts from the record on appeal, that were not included there.[1]

[1] The additional historical evidence are drawn from the transcript of the preliminary hearing and the motion to suppress pursuant to Penal Code section 1538.5. We take judicial notice of the record on appeal in *Shellock I, supra*, H029675.

"At 4:50 a.m. on April 17, 2005, a Campbell police officer noticed a van parked across two parking spaces at the Campbell Inn Hotel, asked dispatch to run its vehicle identification number, and learned that the van had been reported stolen. The officer disabled the van and set up a surveillance. At various times between 6:15 a.m. and 11:10 a.m., two men [Shellock and Porter] and a woman [Pinheiro] were seen to approach the van, open the passenger door and either put something into the van or take something out of the van and head for the hotel.

"At 11:20 a.m., the relief officer saw the two men (one of whom was later identified as defendant) approach the van and detained them for questioning.[2] The officer learned that they were staying in room 101. In a search of the room police discovered a baggie containing 28 grams of a white crystalline substance that was later tested and determined to be methamphetamine."[3] (*Shellock I, supra*, H029675, [p. 2].)

"Defendant entered pleas of no contest to receiving a stolen vehicle with a prior conviction and transportation of methamphetamine (Pen. Code §§ 496d, 666.5[4]; Health & Saf. Code § 11379, subd. (a).) He admitted allegations that he had suffered two prior strike convictions for residential burglary. (Pen. Code § 460.1.) The third such allegation was found true after a court trial. Following denial of his motion to strike the prior convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), defendant was sentenced to prison for 25 years to life." (*Shellock I, supra*, H029675, [p. 1].)

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[2] Porter said he was staying in room 101 and admitted he was on parole. Defendant admitted to police that he was sharing the room with Porter and Pinheiro.

[3] The baggie was located "right on top" of a grey makeup bag that also contained cosmetics. It was on the floor near the front door next to a backpack and a pair of women's shoes. Pinheiro denied that the cosmetic bag belonged to her.

[4] Unless otherwise indicated, all further statutory references are to the Penal Code.

On appeal, Shellock contended that the trial court abused its discretion in denying his *Romero* motion. He also argued that his sentence constitutes cruel and/or unusual punishment. On June 29, 2007, this court affirmed the judgment of conviction.

Shellock also filed a writ petition which was consolidated with his direct appeal. In the petition, he argued that his plea was induced by counsel's ineffective advice that: (1) he had strong motions to suppress evidence pursuant to section 1538.5 and to challenge the holding order pursuant to section 995, and that if he pled it was likely that his convictions would be reversed on appeal; and (2) the judge would grant his *Romero* motion to strike his prior convictions, there was no chance he would be sentenced to 25 years to life and, in all likelihood, he would be sent to a drug program. But for this advice, he would have insisted upon a trial.

This court issued an order to show cause and, on October 7, 2008, the superior court held a hearing on the matter. Petitioner and his former trial attorney testified at the hearing.

Petitioner's Testimony

Petitioner testified that in 2005, he had two pending criminal cases. In the older case, he was charged with possession of stolen property and transportation of drugs. In the second case, he was charged with possession of a hypodermic needle inside of the jail. He was in jail as a result of his arrest in the first case. He was represented in the first case by Attorney Allen Schwartz, who was retained by petitioner's mother.[5] His attorney made a motion to dismiss pursuant to section 995 and a suppression motion. Both were denied. At that time, it was petitioner's opinion that he "had a good chance of beating" both cases if he took them to trial.

He wanted to go to trial, but he decided to plead after having extensive conversations for "couple of hours" with his attorney on August 24, 2005, the day he

[5] He was represented in the needle case by the public defender.

went to court for jury selection.[6] He knew that he was charged with at least two strikes and that he could get a sentence of 25 to life if he were convicted of the felony charges and "those two or more strikes still stood." However, he thought he would not be sentenced to 25 years to life based on his attorney's advice that he "had an action at Appeals and that the strikes were routinely stricken in such cases as mine." Mr. Schwartz advised petitioner that his prospects of getting the judge to strike his strikes on a *Romero* motion "were very good, being as how it was a drug charge and that my previous strikes were . . . non-violent, property crimes and that they were routinely stricken, those kind of strikes." His attorney also told him that "we could appeal the 995 Motion and that by appealing that Motion, that my whole case would be overturned." Petitioner asked his attorney about the appealability of the 995 motion after he pleaded, and "[h]e said by pleading no contest that, that would give me the right to appeal the 995; that it was different than going into a straight guilty plea. [¶] I asked him several times. I go, 'Are you sure that this is the way to go? Will I be able to appeal the 995 Motion?' He said, 'Yes.' " He also said the prospect of success on appeal "was very good and that it would overturn the whole case."

The needle case was also a two strikes case. He understood that he could possibly get 25 years to life on the needle case if he "beat the first case and then not the second." Petitioner did not understand what effect his pleading guilty in the first case would have on the chances that he would receive a three strikes sentence on the needle case; he thought it might be dismissed if here were not to waste the court's time. His attorney told him "that by pleading guilty, that I may get mercy from the Court as far as the other case goes" and, "[a]s to the first case, if I pleaded guilty to it[.] . . . [¶] . . . [¶] The same

[6] He also talked with his attorney before the preliminary hearing, before the section 995 motion, and before the section 1538.5 motion. He also had several phone conversations with his attorney during the pendency of the case and also kept in touch with him between the plea and the *Romero* motion. Petitioner testified that he had enough time to talk his attorney and tell him of his [petitioner's] concerns.

thing. He said that by throwing myself at the mercy of the Court, that they would maybe, probably show some kind of leniency as far as getting into a drug program . . . [a]nd not getting 25 to life."

In short, at the time he changed his pleas on August 24, 2005, he did not believe there was a substantial risk that he was going to get a sentence of 25 years to life, and that belief was based on what his attorney told him. His attorney said it was "very unlikely" that he would get 25 years to life. He did not say it was a "done deal." He did not say it was definite. He did not guarantee it. He did not promise that the judge would strike the strikes. But if petitioner had thought that there was a substantial chance that by pleading he would end up with a sentence of 25 years to life, he would not have changed his pleas, and if he had known as of that date that he could not appeal the section 995 denial, he would not have changed his pleas. He did not find out that he could not appeal the denial of a section 995 motion after pleading no contest until he was in prison and his appellate attorney told him.

Petitioner believed he would have been acquitted at trial, because the drugs were not found on him; they were found in Pinheiro's purse. This was so even though he refused to take a blood test when he was arrested, he had prior convictions for drug offenses that could have been used against him at trial to prove his knowledge, and he told his mother, in a recorded jail telephone call, "It's both of our faults, mom. I'm not completely innocent of everything. It was in her purse and we were together. It's not like I'm dumb and didn't know what's going on."

Asked on cross-examination "what changed to make you decide to … plead on the 24th," petitioner replied: "There was a lot of discussion that day. I got time to confer with my co-defendant and the possibility that she might have been pregnant. [¶] Then my assurances from Mr. Schwartz about the 995 and other Motion, about the appealability of all of that."

Although petitioner was taken by surprise when the judge did not grant his *Romero* motion, petitioner admitted that he wanted to withdraw his plea before the *Romero* motion was heard, and he also wanted Ms. Pinheiro to get deported, because she had lied to him about being pregnant with his baby, and that was "part of the reason for my plea in the first place, I wanted to take it back because I didn't feel I was guilty of the crime at the time and that I would not be convicted of it." His wish to see Pinheiro deported was simple vengefulness, and not motivated by the fear that she would testify against him. Asked to explain "why you would want to withdraw your plea if you felt sure you were going to beat the 25 to life," defendant responded: "I hadn't really thought of it in that aspect. I just knew the lies—I wasn't really thinking about the assurances that [Mr. Shwartz] had given me. [¶] I was thinking about the lies that I had been told and that I no longer wanted that plea and I wanted to withdraw my plea."

Under questioning by the court, petitioner clarified that he changed his mind about his plea on the day set for trial, and on that day he had conversations with his codefendant and then-girlfriend, Pinheiro, and with his attorney. On that day, Mr. Schwartz told him for the first time that an appeal from the denial of the 995 motion would result in overturning the whole case, although they had talked about appealing the motion before. Thus, part of the reason why he pleaded no contest was that he expected the case to get dismissed eventually on appeal from the section 995 motion. However, petitioner understood that if he was successful in getting the strikes stricken, the district attorney would continue to pursue the needle case, which was also a three strikes case; that case would be dismissed only if the court did not strike the strikes in the transportation case. This was also a factor in his change of plea. A further consideration in the change of plea was Mr. Schwartz's opinion that he would have a better shot at winning the *Romero* motion by not taking the case to trial. He was trying to make the best decision for himself to get the least amount of time.

Another part of his reason for pleading was his girlfriend. However, he did not tell the judge that "[b]ecause Allen [Schwartz] told me just to say that no, it wasn't." However, he did not base his decision to plead on her as much as he did "the 995 Motion contentions and the *Romero* contentions. Had [Mr. Schwartz] said . . . 'Hey, it is not going to look good for you. There is a good likelihood that you will get 25 to life and the drug program, all that other stuff, the strikes won't be stricken,' I would never have taken the plea. I would have insisted on going to trial like I wanted to in the first place."

Petitioner admitted it was true that he believed he was "between a rock and a hard place" because he had two pending strike cases, and he knew he had no defense whatsoever to the needle charge. That factor also influenced his decision to plead. He also admitted that he told his mother, in a recorded telephone call from the jail, "I'm trying to explain it as well as he could, but if one of these charges is going to be dismissed, so they're going to be dismissed. The ones that I'm taking right now and what our hope is that by taking this, [the judge] is going to show a little leniency on the other [needle in the jail] case and possibly dismiss it and let me get like a drug program or something like that."

Trial Counsel's Testimony

Mr. Schwartz testified that he was retained by petitioner's family to represent him on the case involving receiving stolen property and drug charges. While petitioner was in jail on that case, he was arrested on a new three strikes case involving possession of a needle by a jail inmate. Schwartz did not represent petitioner in that case. In his view, petitioner's receiving stolen property/drug case was "arguable and defensible."

Until the day he changed his plea, petitioner wanted to go to trial. On that day, petitioner had a conversation with his codefendant, who was pregnant with his child and was afraid of being deported. Petitioner told Schwartz that, according to Pinheiro, "if he would accept responsibility for the drugs that were found, she would not be held accountable for it." Schwartz did not recall the exact disposition of Pinheiro's case,

except that "Mr. Shellock had decided that he would do the right thing by her and step up and take responsibility for the drugs and the stolen van." "[B]ased upon his conversations and her convincing him that his help was needed for her and their child, he decided to change his plea to no contest." At that point, Mr. Schwartz felt: "I had my instructions. That's what he wanted to do and I wasn't able to convince him otherwise. It was something he felt strongly about. I don't recall trying to urge him or pressure him not to change his plea. [¶] Frankly, I . . . recall that one day I just came in and he had gotten the word from her that she needed his help for their child to be and he had decided to change his plea. I can't say that I tried to convince him otherwise. That was what he wanted to do."

According to Schwartz, petitioner was also concerned with the prospect of going to prison for 25 years to life. Before petitioner changed his plea, he and Schwartz discussed the chances that he would receive a three strikes sentence. "I certainly didn't quantify or guarantee any kind of a result, but I thought based upon the facts of the case, he had some equity there." The strikes were nonviolent, they were daytime burglaries when no one was at home, they were not recent, and the pending charges were also nonviolent. "[G]iven the fact that Mr. Shellock wanted to plead to the charges and that the Judge will allow a *Romero* Motion after plea, I thought that he had some chance of success." He characterized it as "a good chance of success" and felt "very confident that the Motion should be granted." He thought there were very positive factors in petitioner's social history and background "that would work toward guaranteeing or assuming success on that Motion." It was his belief at the time that petitioner would have a better shot at winning the *Romero* motion if he did not take the case to trial, and he believed he told petitioner so. Schwartz was also concerned that Pinheiro would testify against him at trial, strengthening the prosecution's case. That was also part of his advice and calculation to petitioner about not going to trial. In addition, the prosecutor's offer to dismiss the jail case if petitioner received a three strikes sentence in the drug case was a

factor in the decision to plead, but it was not a deciding factor. However, "the reason that Mr. Shellock decided to plead guilty or no contest was because of what he had learned from his co-defendant and the consequences she would suffer unless he did change his plea. As far as I remember, that was the inducement to change his plea." Given that "the choice of not going to trial was Mr. Shellock's, . . . I felt that we would put all our effort into a [*sic*] doing a really strong *Romero* hearing. . . . [¶] . . . [¶] I felt we put on a very strong showing for the *Romero* that I believe was certainly meritorious." Because he feared Pinheiro's testimony at the hearing on the *Romero* motion would be unfavorable, he "didn't prevent her from coming to court, but I certainly didn't subpoena her as a witness on Mr. Shellock's behalf."

Schwartz did not recall using the word "unlikely" to describe the chance that petitioner's would receive a three strikes sentence. He acknowledged that the declaration he signed in 2006 at the behest of petitioner's appellate counsel indicated he used the word "unlikely." Schwartz also acknowledged that, according to the declaration, in "urging Mr. Shellock to enter a no contest plea," he discussed the appealability of his pretrial motions pursuant to sections 995 and 1538.5 and the success of his *Romero* motion with petitioner. However, he did not recall urging petitioner to change his plea. He recalled that he "didn't have to twist Mr. Shellock's arm to plead guilty. That was his decision. We had the discussion about what consequences would flow" after the decision to change his plea was made. Schwartz explained: "I didn't prepare the Declaration. I did sign it."

Schwartz admitted that he listed as an issue in the notice of appeal the denial of the section 995 motion "with the mistaken belief that, that would be an appealable issue."

When petitioner learned that Pinheiro had deceived him regarding her pregnancy, he informed Schwartz that he wanted to withdraw his plea. Schwartz first thought that the deception would not be a basis for withdrawing the plea, "given the voir dire that Judge Lee conducted at the time of the change of plea." "More importantly, there was

another issue that I wanted to avoid . . . of Mr. Shellock's being physically abusive to Ms. Pinheiro and I didn't want the judge to get any idea that Mr. Shellock was a violent person or physically abusive person. [¶] I was, through her attorney, threatened with that possibility, that if Mr. Shellock were to withdraw his plea and go back to where they were, she would do whatever she could to block that attempt. I didn't want the Court to have any concerns about Mr. Shellock's character in that regard. [¶] My advice to him was not to try to withdraw his plea because if he did try to withdraw his plea and he was unsuccessful, the subsequent *Romero* Motion would be somehow affected by it."

Asked how, as an officer of the court and in good conscience, he could allow his client to fill out a plea waiver form "saying he is doing this plea freely and voluntarily and not for anyone's benefit, if, . . . you're saying he entered the plea for Ms. Pinheiro's benefit," Mr. Schwartz responded that petitioner was doing it for his own benefit: "That was his child that was involved and it was his wife or future wife that was involved. He changed his plea for his own benefit. It may have had a collateral effect on her as well, but he was doing it for his benefit. . . . [¶] . . . [¶] I know it turns out to all be false, but it's his child that's going to benefit from the arrangement. [¶] . . . [¶] If the question were put to Mr. Shellock, as I believe it would have been, 'Are you doing this for your own benefit and not for the benefit for any co-defendant,' if his answer was yes, that would have been a truthful answer."

Mr. Schwartz believed that "if it weren't for Pinheiro being pregnant, Mr. Shellock wouldn't have pleaded;" if he had "known there was a very substantial likelihood that he was going to prison for 25 years to life, he wouldn't have pleaded, Pinheiro or no Pinheiro;" but if he had known the section 995 motion was not appealable, he would have pleaded anyway.

Telephone calls from the Jail

The court also had before it as evidence the transcripts of the recorded jail conversations between petitioner and his family members. These shed some light on

petitioner's state of mind both before and after his plea. They show that as of August 15, 2005, he believed Pinheiro looked "super pregnant." He was "so happy" but felt "terrible" that there was nothing he could do to protect her. He admitted co-responsibility for the drugs.

On August 19, petitioner was shocked that a motion had been denied and that trial was to start the following Tuesday. He reported that his attorney "sounds really good" about going to trial.

On August 25, petitioner reported to Aura, his mother's partner, that he had some "bad news" and he was "kind of scared." He believed that his and Pinheiro's cases were going be dismissed in four months, but "that other case is still gonna hang me." Pinheiro had gotten a really good deal and was going to be out soon, "but me umm I don't know, uh." He hoped she and his mother would work with him. He eventually admitted that he "took a deal yesterday" for "twenty five to life" but it's not what it sounds like." "[W]hen I go to the *Romero* Hearing" "[t]hat's gonna come back down" "to two years, although "when we beat the P.O. it'll all be wiped away."

On August 26, petitioner told his mother that he "took 25 to life" "because I screwed myself up over in uh, over at [inaudible] while I was there, um, they, it, it makes everything complicated, so because there's no way I can beat that case over there, do you understand? So, what, what we did was we took a deal where's not a deal, but what we're doing is making things easy in the, in the court's eyes, alright? But I know it sounds bad but it's not or else I'd be crying right now, so what we do on the 19th is we do a *Romero*, it's called a *Romero* Hearing." He reported to his mother that his attorney said if worse came to worse, he would get a drug program.

On August 27, when petitioner's mother observed that if the judge didn't strike the strikes "then you spend 25 to life in prison," petitioner accused her of not listening to him. He assured his mother that "things are gonna be alright, I, I'm pretty um, pretty confident of everything" "or I wouldn't have taken the deal, you know what I mean?

There, because I mean there's no way they could pin this on me, and we still have the appeal" "and these charges will be dismissed." He reiterated that he had "screwed myself by doing what I did [inaudible]."

On August 28, when petitioner's mother told him that she believed he would plead guilty if it meant Pinheiro would get off, petitioner admitted that "that had a little bit to do with it," but "[n]ot for 25 to life" "because I mean that would be senseless."

On September 22, when petitioner's mother expressed displeasure with his attorney for continuing the *Romero* motion to November, petitioner explained to her that he had done it "because he wants it done right." "I mean we're facing 25 to life there."

By the time of the October 4, 2005 conversation between petitioner and Aura, petitioner had learned that Pinheiro was lying about her pregnancy. Petitioner told Aura that he had been "writing everybody to try to get her deported." When petitioner told Aura that Pinheiro had been lying to him since the beginning "because she wanted me to take the case off of her," Aura responded, "Yeah which you did, oh my gosh." Petitioner replied, "Well, no[] I didn't really. I mean there's a, see I have this other case." "Which is why the main reasons why I took the deal." "Because that one I can't fight. They'll find me guilty." "And my lawyer told me to, to plea guilty and throw myself at the mercy of the court." "And that, and that the judge would be way more lenient on me if we did that, showing that I was you know trying to get mercy from the court." "So that's, that's the main reason I did it was because he kept telling [me] that was the best thing. . . . I go why . . . and he's all because you cut that thing on this other case. There's no way we're gonna be able to fight that other case." "And if we fight this one and you get found guilty then there's not gonna be any leniency shown towards you." "And I go but they'll never find me guilty, he goes but if they do." "And I said are you, I kept telling him are you absolutely sure that this is the best way for me to go." "And he said yes, so, and then, I, I asked him every time he comes, I'm, I'm all, you sure this is what's best." "And he . . . keeps telling [me] yeah it's. . . ." "I don't feel . . . that it, it is [good advice]

because I know that I had this case beaten." "But then I have the other case which I don't know, could be a little bit tougher." "So I don't know, everything's, now I'm, now I'm more focused on, on me as well so."

On October 6, petitioner informed Aura that he was going to withdraw his plea. Petitioner expressed disbelief Pinheiro was threatening to testify against him, and said he would be "shocked" if she showed up in court. Petitioner then called immigration to leave a message that Pinheiro had been convicted of a felony.

On October 7, petitioner told Aura that his lawyer was "kind of wishy wash" about "what he really wants to do with this whole thing." "[B]ecause I'm taking this plea back in, because I'm coming to realize that I'm gonna get washed if I don't, and on a case that it has nothing against me really." "Everything points at, at [Pinheiro]." "And nothing points at me." "I think he thinks that we might have some problems withdrawing this plea, so we're gonna subpoena her uh, her medical records, her mental records, everything."

On October 22, petitioner's mother told him that according to his lawyer, if he withdrew his plea and went to trial, Pinheiro would probably testify against him, and the lawyer believed the *Romero* motion was the best chance he had. Petitioner expressed doubt, because there were three people in the jail who had just had *Romero* motions and all had come away with long sentences. He also expressed confidence that Pinheiro would not testify against him. Petitioner also informed his mother that according to his lawyer, they had "major action and appeal" with the section 995 motion, and that they were going to beat the other case too because the strip search that they did was unconstitutional.

Trial Court Findings

Throughout the hearing, the trial court made a number of observations about the evidence before it. For example, respecting petitioner's motive for attempting to have Pinheiro deported, the trial court stated, "I think there is ample reason to not have her as a

witness, but there seems to be ample reason to have other animosity towards her as well." With respect to Mr. Schwartz's declaration, the court said that "[u]nless there is a reason for either Counsel to point out that I should not take the Declaration at face value, I intend to take the Declaration as true on its face value." The court also stated that it was satisfied that "Mr. Schwartz believed he had a defensible case, but not a one hundred percent sure bet, that he would win" and "with Mr. Schwartz's testimony about what he believes the inducement was at the time. What the major inducement was—he said it several times—as to when Mr. Shellock decided to enter his plea on that day." Finally, the court observed: "The basis of why he would advise that he does have good chance of succeeding on the *Romero* seems to be valid, at least in my experience of *Romeros*. They are property crimes and they do involve residential burglaries. They are old crimes. There is a drug history. There is a non-violence history. [¶] All of those seem to be appropriate reasons why you would advise someone that they had a certainly never 100 percent chance, but they have a good chance of succeeding. There is a myriad of reasons here in Mr. Shellock's case why he would also have a good chance of not succeeding."

At the conclusion of the evidentiary hearing, and after argument, the court made the following comments: "I'm prepared to make some sort [of] factual finding on that. I believe Mr. Schwartz thoroughly discussed the matter with Mr. Shellock regarding the consequences. I don't believe he was misadvised. [¶] I don't believe it was below the standard of care for Mr. Schwartz to advise him that in his opinion it's unlikely he will receive such a sentence given the facts that were to his benefit. [¶] I do also believe Mr. Schwartz's testimony when he said it was made clear to Mr. Shellock that there was certainly a possibility that the *Romero* would be denied. . . . [¶] That was voir dired by [the prosecutor] as well as the Court. I'm assured by Mr. Schwartz in response to my question that Mr. Shellock knew there was a possibility of 25 to life. [Illegible] care to advise him that he had a good chance on the *Romero*, however you want to phrase that, unlikely such a sentence would be imposed. I think advising him that he had a good

chance to have those strikes stricken, would be appropriate here because of the nature of those strikes. [¶] I think if the Court had stricken those strikes and reduced Mr. Shellock's sentence either to a two-striker or a no-striker, it would not have been overturned on appeal as an abuse of discretion based upon the fact that they were old property crimes, they did have a good chance of being stricken. [¶] Those are the kinds of cases that are reduced. It just happens to be that in this case Judge Lee did not believe they should be stricken. So, I don't believe that's below the standard of care. [¶] I also . . . do think it's error and below the standard of care for Mr. Schwartz to advise Mr. Shellock that, that's an appealable order when it absolutely is not an appealable order. [¶] I don't believe there is prejudice there and I don't believe that, that was a controlling factor whether he correctly advised him as to the appealability of that issue or not, I'm referring to the advisement of the appealability [of] the 995, would not have changed Mr. Shellock's opinion on whether or not to go to trial. [¶] So, I don't believe the prejudice prong as to the 995 motion was satisfied even though advising Mr. Shellock that is an appealable issue is below the standard of care.

The court requested additional briefing on the question whether there was ineffective assistance of counsel in the context of withdrawing the plea. The court explained: "The testimony of Mr. Schwartz today that concerned me about the basis of Mr. Shellock's plea, was his conversation with his co-defendant and Mr. Shellock is, as is every defendant, entitled to plead guilty; however, in the context of IAC or other issues, I'm concerned about the matter going forward with a representation being made to the Court either in oral voir dire or by the written waiver that the plea was . . . not made for the benefit of the co-defendant because it appeared that it had been made for the benefit of the co-defendant. [¶] Particularly given that knowledge, the Motion to withdraw plea not being brought when you were Counsel and you know that the plea has been entered based on false representations of co-defendant, if there is any IAC issues there."

The parties submitted letter briefs to the court. Thereafter, on February 25, 2009, the court issued a written order consistent with its oral findings after the hearing. The court also found that counsel did not labor under a conflict of interest that influenced his advice that petitioner refrain from making a motion to withdraw his plea. Therefore, no ineffective assistance on this ground had been shown.

DISCUSSION

Contentions

Petitioner argues that counsel's erroneous advice pertaining to the appealability and strength of his section 995 motion fell below an objective standard of reasonableness under prevailing professional norms. He claims that the record contains the following evidence that he would not have changed his pleas if he had known the advice was erroneous: (1) his testimony that he would not have pleaded if he had known that the motion to dismiss was not appealable; and (2) phone calls from the jail indicating that he believed the appeal would overturn his entire case. The People concede that defense counsel's advise was erroneous. (*People v. Lopez* (1988) 198 Cal.App.3d 135, 140-142) They counter that petitioner suffered no prejudice, because the motion was neither meritorious nor a significant inducement to enter a no contest plea.

Petitioner also argues that defense counsel's performance "was ineffective by failing to fully advise [him] of the risks of entering such a no contest plea and the likelihood of [him] obtaining relief under *Romero*." He argues that it would have been an abuse of discretion under *People v. Williams* (1998) 17 Cal.4th 148 for the trial court to have stricken even one of petitioner's three prior strike convictions, and that in fact his chances of success were "slim, if not non-existent." He also argues that the record demonstrates he would not have entered a no contest plea if he had not relied on his attorney's misadvice. The People argue that counsel's advice was not misleading or incompetent, and that petitioner fully understood the risk he undertook by changing his plea.

Finally, petitioner argues that counsel was ineffective for counseling him against making a motion to withdraw his pleas. He argues that Pinheiro's deception constituted a sound basis for withdrawal of the pleas, and that counsel's advice to the contrary was tainted by a direct, actual conflict of interest, in that he had advised petitioner to sign the waiver form stating that he was not changing his plea for the benefit of his codefendant. The People contend that trial counsel had sound tactical reasons for advising petitioner against withdrawing his plea, and that the trial court's factual findings on this point are entitled to deference.

Before turning to the merits of petitioner's claims, we review the relevant legal principles that guide our analysis.

Applicable Legal Principles

Role of Appellate Court

When the superior court has denied a habeas petition after an evidentiary hearing, "the appellate court is not bound by the factual determinations [made below] but, rather, independently evaluates the evidence and makes its own factual determinations." (*In re Wright* (1978) 78 Cal.App.3d 788, 801.) However, the trial court's factual determinations are entitled to deference when they are based on the credibility of live testimony. (*In re Resendiz* (2001) 25 Cal.4th 230, 249, disapproved on other grounds in Padilla v. Kentucky (2010) 559 U.S. ___ [130 S.Ct. 1473, 1484]; *In re Wright, supra,* 78 Cal.App.3d at p. 801.) "Accordingly, the Court of Appeal . . . undertake[s] 'an independent review of the record [citation] to determine whether petitioner has established by a preponderance of substantial, credible evidence [citation] that his counsel's performance was deficient and, if so, that [he] suffered prejudice.' (*In re Alvernaz* [(1992)] 2 Cal.4th [924,] 944-945 [(*Alvernaz*)].) [¶] While our review of the record is independent and 'we may reach a different conclusion on an independent examination of the evidence . . . even where the evidence is conflicting' (*In re Hitchings* (1993) 6 Cal.4th 97, 109), any factual determinations made below 'are entitled to great

weight ... when supported by the record, particularly with respect to questions of or depending upon the credibility of witnesses the [superior court] heard and observed.' (*In re Wright, supra,* 78 Cal.App.3d at p. 801; see also *People v. Ledesma* [(1987)]43 Cal.3d [171,] 219.) On the other hand, if 'our difference of opinion with the lower court ... is not based on the credibility of live testimony, such deference is inappropriate.' (*In re Arias* (1986) 42 Cal.3d 667, 695; see also *In re Hitchings*, at p. 109.)" (*In re Resendiz, supra,* 25 Cal.4th at p. 249, fn. omitted.)

Where any factual disputes are already shown in the trial record, the merits of the habeas corpus petition can be decided without this court conducting or ordering an additional evidentiary hearing. (See *In re Resendiz, supra,* 25 Cal.4th at 249, fn. 11.)

The *Strickland*[7] Standard

Under state law, "[a] defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. (*People v. Price* (1991) 1 Cal.4th 324, 440; *People v. Anderson* (2001) 25 Cal.4th 543, 569.) The rule is the same under federal law. "To establish ineffective assistance of counsel 'a defendant must show both deficient performance by counsel and prejudice.' " *Knowles v. Mirzayance,* 556 U.S. ___, ___, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251 (2009)." (*Premo v. Moore* (2011) ___ U.S.___ [131 S.Ct. 733, 739].) In this context, "trial counsel's tactical decisions are accorded substantial deference [citations], . . . A reviewing court will not second-guess trial counsel's reasonable tactical decisions." (*People v. Riel* (2000) 22 Cal.4th 1153, 1185; *Strickland, supra,* 466 U.S. at p. 689 ["Judicial scrutiny of counsel's performance must be highly deferential."],

[7] *Strickland v. Washington* (1984) 466 U.S. 668, 689 (*Strickland*)

690 [“strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable”].)

The United States Supreme Court has recently discussed the application of the *Strickland* standard to counsel’s tactical decisions made during plea negotiations. “ ‘ “Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. ___, ___ [130 S.Ct. 1473, 1485, 176 L.Ed.2d 284] (2010). [T]he *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690 [104 S.Ct. 2052]. Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” [Citations.] The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690. . . . [¶] The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at ___ [129 S.Ct., at 1420].’ ” (*Premo v. Moore, supra* ___U.S. ___ [131 S.Ct. at pp. 739 -740].)

“Acknowledging guilt and accepting responsibility by an early plea respond to certain basic premises in the law and its function. Those principles are eroded if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when actions and advice leading to the plea took place. Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks. The opportunities, of course, include pleading to a lesser charge and obtaining a lesser sentence, as compared with what might be the outcome not only at trial but also from a later plea

offer if the case grows stronger and prosecutors find stiffened resolve. A risk, in addition to the obvious one of losing the chance for a defense verdict, is that an early plea bargain might come before the prosecution finds its case is getting weaker, not stronger. The State's case can begin to fall apart as stories change, witnesses become unavailable, and new suspects are identified. [¶] These considerations make strict adherence to the *Strickland* standard all the more essential when reviewing the choices an attorney made at the plea bargain stage. Failure to respect the latitude *Strickland* requires can create at least two problems in the plea context. First, the potential for the distortions and imbalance that can inhere in a hindsight perspective may become all too real. The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision. There are, moreover, special difficulties in evaluating the basis for counsel's judgment: An attorney often has insights borne of past dealings with the same prosecutor or court, and the record at the pretrial stage is never as full as it is after a trial. In determining how searching and exacting their review must be, habeas courts must respect their limited role in determining whether there was manifest deficiency in light of information then available to counsel. *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). [¶] . . . [¶] Whether before, during, or after trial, when the Sixth Amendment applies, the formulation of the standard is the same: reasonable competence in representing the accused. *Strickland,* 466 U.S., at 688. In applying and defining this standard substantial deference must be accorded to counsel's judgment. *Id.,* at 689. But at different stages of the case that deference may be measured in different ways. [¶] In the case of an early plea, neither the prosecution nor the defense may know with much certainty what course the case may take. It follows that each side, of necessity, risks consequences that may arise from contingencies or circumstances yet unperceived. The absence of a developed or an extensive record and the circumstance that neither the prosecution nor the defense case has been well defined create a particular risk that an

after-the-fact assessment will run counter to the deference that must be accorded counsel's judgment and perspective when the plea was negotiated, offered, and entered." (*Premo v. Moore, supra,* ___U.S. ___ [131 S.Ct. at pp. 741-742].)

Counsel's Performance

"Counsel's first duty is to investigate the facts of his client's case and to research the law applicable to those facts. 'Generally, the Sixth Amendment and article I, section 15 require counsel's "diligence and active participation in the full and effective preparation of his client's case." [Citation.] Criminal defense attorneys have a " 'duty to investigate carefully all defenses of fact and of law that may be available to the defendant . . . .' " ' [Citation.] The client's initial insistence on one defense and opposition to all others does not 'excuse counsel from undertaking sufficient investigation of possible defenses to enable counsel to present an *informed* report and recommendation to his client.' " (*People v. Ledesma, supra,* 43 Cal.3d 171, 222.)

"It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea. [Citations.] In *Hill v. Lockhart* [(1985) 474 U.S. 52],the United States Supreme Court applied the criteria for assessing ineffective assistance of counsel, set forth in *Strickland v. Washington* (1984) 466 U.S. 668, to a claim of incompetent advice as to the decision whether to plead guilty. The court held that in order successfully to challenge a guilty plea on the ground of ineffective assistance of counsel, a defendant must establish not only incompetent performance by counsel, but also a reasonable probability that, but for counsel's incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial. (474 U.S. at pp. 58-59.)" (*Alvernaz, supra,* 2 Cal.4th 924, 934.)

"Conflicted" Counsel

Conflicts of interest " ' "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a

third person or *by his own interests*." ' [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 459 (*Doolin*).) A claim of conflicted counsel is, in essence, a claim of ineffective assistance of counsel, and it is analyzed under the *Strickland* standard whether the claim is made under the state or federal constitution. (*Id*. at p. 421.) Adopting the reasoning of *Mickens v. Taylor* (2002) 535 U.S. 162 (*Mickens*), the *Doolin* court held that ineffective assistance of counsel claims based on conflicts of interest "generally require a defendant to show (1) counsel's deficient performance, and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different. [Citations.] In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest '*that affected counsel's performance*—as opposed to a mere theoretical division of loyalties.' [Citations.] '[I]nquiry into actual conflict [does not require] something separate and apart from adverse effect.' [Citation.] 'An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.' [Citation.] [¶] This court has suggested that a determination of whether counsel's performance was 'adversely affected' under the federal standard 'requires an inquiry into whether counsel "pulled his punches," i.e., whether counsel failed to represent defendant as vigorously as he might have, had there been no conflict. [Citation.] In undertaking such an inquiry, we are . . . bound by the record. But where a conflict of interest causes an attorney not to do something, the record may not reflect such an omission. We must therefore examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission.' [Citation.]" (*Id.*, at p. 430.)

With these principles in mind, we now turn to petitioner's specific claims.

Appealability of section 995 Motion

Resolution of the issues in this case turns in large part on a factual determination of petitioner's motive or motives that led him to enter pleas of no contest to the pending charges on the eve of trial, and what advice his attorney gave him. Petitioner testified that trial counsel's misadvice about the appealability and strength of his section 995 motion was an important inducement to plead, and but for that inducement, he would not have changed his plea. Mr. Schwartz, on the other hand, testified that petitioner had already decided to plead no contest in order to help his pregnant girlfriend, before he advised petitioner about the likelihood of success on a *Romero* motion. He did not recall discussing the appealability of the section 995 motion on that day. Both agreed that if petitioner had known there was a substantial likelihood that he would go to prison for 25 years to life, he would not have changed his plea, whether or not Pinheiro was pregnant with his child and likely to be deported. Schwartz was of the opinion that if petitioner had known the section 995 motion was not appealable, he would have pleaded no contest anyway. Petitioner testified he would not have done so.

With respect to trial counsel's advice that denial of the section 995 motion was appealable, the trial court assumed trial counsel's advice was erroneous but found no prejudice. That is, the court found that "no evidence was presented that suggested Petitioner would not have plead no contest had the advice been different with regard to Petitioner's Penal Code section 995 motion." After independently reviewing the record before us, we agree. The record supports the view that other considerations were far more important.

In our view, petitioner's plea was motivated by a number of considerations, of which the appealability of the section 995 motion was probably the least significant. Most significant appears to have been the fact that, no matter what happened to the drug case, he would still be facing another three strikes case. Petitioner candidly admitted at the evidentiary hearing, and to his family members, that the jail case was indefensible.

He told his mother that the jail case was "still gonna hang" him. Thus, he accepted his lawyer's advice to throw himself at the mercy of the court by pleading no contest, in the hope that the court would be lenient with him, in *both* cases. To be sure, Pinheiro's pregnancy played some part in his decision to change his plea. However, as he explained to Aura, when she expressed the belief that petitioner had pleaded no contest "to take the case off of [Pinheiro]": "Well, no I didn't really. I mean there's a, see I have this other case" "Which is why the main reasons why I took the deal." "Because that one I can't fight. They'll find me guilty." "And my lawyer told me to, to plea guilty and throw myself at the mercy of the court." "So that's the main reason I did it was because he kept telling [me] that was the best thing."

It is clear from petitioner's testimony and the substance of his telephone calls to his family members that the possibility of a three strikes sentence in the needle case weighed heavily on him, and would continue to do so even if he won acquittal of the drug case at trial *or* dismissal of the charges after appeal of the section 995 motion. At most, the appeal provided a backup plan for getting rid of the drug case. The main strategy remained putting together a compelling *Romero* motion that would convince the court to be lenient. Even though petitioner understood that the district attorney would continue to prosecute the needle case if the court decided to grant the *Romero* motion, implicit in the defense strategy was the logical assumption that having persuaded the court once not to sentence petitioner as three striker in the more serious of the two cases, the court would not be persuaded by the district attorney to sentence him as a three striker in the less serious case, even if the district attorney continued to pursue that end. The appeal played no role in that overarching strategy.

Petitioner's self-serving testimony that he would not have entered no contest pleas if he had known that the section 995 motion was not appealable, "is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked

flow of easily fabricated claims." (*Alvernaz, supra*, 2 Cal.4th at p. 938.) In this case, petitioner's assertion is not corroborated by credible evidence in the record. Defendant's statement to his mother, on October 6, while he was contemplating withdrawal of his plea, that they had "major action and appeal" with the section 995 motion and were going to beat the jail case because the strip search was unconstitutional, was likewise self-serving and has the ring of desperate bravado. Furthermore, the trial court did not credit it. Based on our independent review of the record before us, we conclude that petitioner has failed to show by a preponderance of credible, independently corroborated evidence that there was a reasonable probability he would have decided to go to trial but for his trial counsel's misadvice about the appealability of the section 995 motion. "For this reason, we conclude petitioner has failed to establish prejudice. Such failure is fatal to his claim that he was deprived of the effective assistance of counsel guaranteed by the federal and California Constitutions." (*Alvernaz*, *supra*, 2 Cal.4th at p. 946, fn. omitted.)

Overly Optimistic Advice about the Success of the Romero Motion

In our view, there is no question that petitioner relied on defense counsel's advice that given his predicament, his best chance to obtain a lenient sentence was to forgo a trial on the drug case, plead no contest, present a compelling showing on a *Romero* motion, and throw himself on the mercy of the court. Furthermore, there is no real question that if counsel had informed petitioner that there was little or no likelihood of winning a *Romero* motion, given his prior record and poor prospects, petitioner would have taken his chances at trial. Rather, the question here is whether counsel's advice—which, with the aid of 20-20 hindsight, appears to have been overly optimistic—"was within the wide range of reasonable professional assistance" expected of attorneys in criminal cases. (*Strickland*, *supra*, 466 U.S. at p. 689; *Alvernaz*, *supra*, 2 Cal.4th at p. 937.)

We are mindful that the court made several factual findings relevant to our inquiry. First, the court found that counsel thoroughly discussed the matter with

petitioner "regarding the consequences." "I also do believe Mr. Schwartz's testimony when he said it was made clear to Mr. Shellock that there was certainly a possibility that the *Romero* would be denied. [¶] . . . [¶] That was voir dired by [the prosecutor] as well as the Court. I'm assured by Mr. Schwartz in response to my question that Mr. Shellock knew there was a possibility of 25 to life."

These findings are supported by other evidence in the record, and are therefore entitled to deference. Petitioner himself admitted at the hearing that he there were no guarantees his motion would be granted. In his telephone calls, he exhorted family members to help him in his efforts to assemble compelling evidence in the form of character witnesses and drug program representatives, demonstrating awareness that the success of the motion would depend on the strength of his showing. Thus, assuming petitioner relied on advice that it was "unlikely" he would receive a three strikes sentence, he understood that the unlikelihood of such a sentence depended on a number of different variables, only some of which were under his, or counsel's, control.

The trial court also found that, given the custom and practice in that particular superior court, the factors on which counsel based his assessment of the likelihood of success—the fact that they were "old property crimes," and that the current crimes were also nonviolent—"they did have a good chance of being stricken. [¶] Those are the kinds of cases that are reduced. It just happens that in this case Judge Lee did not believe they should be stricken." Nothing in the record suggests that the custom and practice of the Santa Clara County Superior Court was different than the trial court's perception of it—or counsel's perception, for that matter. Therefore, we accept the court's view that, as a factual matter, defendant did stand a good chance of winning his *Romero* motion, even if there were also factors that militated against its success.

We are also mindful of the emphasis the United States Supreme Court has lately placed on reviewing court deference to trial counsel's tactical decisions in the pre-plea context. "[H]abeas courts must respect their limited role in determining whether there

was manifest deficiency in light of information then available to counsel." (*Premo v. Moore, supra*, ___ U.S. ___ [131 S. Ct. at p. 741].) Here, it is only in hindsight and under the bright glare of heightened appellate scrutiny that the pitfalls of the defense strategy seem obvious. Based on our review of the record as a whole, the extent of petitioner's quandary with two pending three strikes cases, only one of which was defensible, and taking into consideration the trial court's factual findings, we conclude that counsel's advice fell within the acceptable range of competence demanded of criminal defense attorneys. Therefore, petitioner's claim of ineffective assistance of counsel on this ground also fails.

Ineffective Assistance of Conflicted Counsel

Finally, petitioner alleges that Mr. Schwartz advised him not to make a motion to withdraw his plea because of self-interest: he did not want Judge Lee to know that he had advised petitioner to state under oath that he was not entering his pleas of no contest to help his codefendant when, in fact, counsel knew that was a lie. *Doolin* teaches that when a conflict involving counsel's self-interest is alleged, the reviewing court's role is to "examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission. [Citation.]" (*People v. Doolin, supra,* 45 Cal.4th at p. 417.) Here, counsel explained that he had several tactical reasons for advising petitioner to refrain from moving to withdraw his plea. Most importantly, counsel feared that a motion to withdraw the plea would adversely affect the *Romero* motion. Specifically, he feared that if petitioner did anything to unravel the package deal that had benefitted Pinheiro, she would retaliate by testifying at the *Romero* hearing that she had been the victim of domestic violence at petitioner's hands. As counsel put it, "I didn't want the judge to get any idea that Mr. Shellock was a violent or physically abusive person." Such information would have undermined the very basis of the motion, namely

that neither petitioner's prior strikes, nor his current offenses, were violent. This explanation must have been credited by the trial court, since that court relied on it to reject petitioner's conflict of interest claim. We find nothing in the record to suggest that defense counsel's tactical explanation was a sham, or that he acted out of disloyalty to petitioner. On the contrary, the record demonstrates that counsel did everything he could to minimize the negative fallout from the revelation of Pinheiro's deception. In addition, we accept as true petitioner's various admissions that he did *not* change his pleas solely or even primarily for Pinheiro's benefit, but rather was trying to make the best decision for himself to get the least amount of time. Petitioner has not established ineffective assistance of counsel grounded in a conflict of interest.

CONCLUSION

Petitioner has not established that he was prejudiced by counsel's misadvice about the appealability of a section 995 motion; that counsel's advice regarding the likely success of a *Romero* motion was not within the wide range of reasonable professional assistance demanded of attorneys in criminal cases; or that counsel's advice against bringing a motion to withdraw the pleas was motivated by a conflict of interest rather than tactical considerations.

DISPOSITION

The petition for writ of habeas corpus is denied.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.